BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

AVERY INTERNATIONAL CORPORATION
(Petitioner)
Attn: Lorne H. Smith, C.P.A.

PRECEDENT
TAX DECISION
No. P-T-449
Case No. T-86-33

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. LA-T-18433

The Department appealed from the decision of the administrative law judge which granted the petition for review of the denial of the claim for refund.

STATEMENT OF FACTS

The petitioner is a manufacturer of office supplies, labels and tickets, and furniture materials. It operates in 33 locations in the United States and employs approximately 5,000 persons. It files unemployment contribution returns in every state. Returns for all the states are filed from its Pasadena, California headquarters.

Some time prior to June 20, 1983 the petitioner prepared its DE 3M, monthly deposit of worker contributions and personal income tax withheld, for the period from May 1, 1983 through June 19, 1983. On June 20, 1983 the petitioner's computer-produced check in the approximate amount of $172,000 was signed by two of its corporate officers. On June 21, 1983, the remittance due for California was inadvertently placed in the envelope preaddressed to the Commonwealth of Virginia. The return and remittance intended for Virginia was placed in the California envelope. Both remittances were due to be mailed on June 21; the California remittance would have been timely if mailed on that date. The remittance intended for Virginia was received by the Department on June 22, 1983.

Each state forwarded the other's mail. The envelope from Virginia to California was postmarked June 27, 1983. Thus, the Department considered the remittance to be six days late.

On February 14, 1984 the Department prepared a billing for the penalty and interest for the untimely remitted personal income tax withheld in the amount of $16,391.18. Of this amount, $14,632.68 was penalty and $1,758.50 was interest. No penalty or interest was assessed on the worker contribution portion of the remittance pursuant to section 991 of the Unemployment Insurance Code. That section provides that a remittance for employer and worker contributions intended for California but inadvertently and without negligence mailed to another state shall be considered timely filed if mailed by the due date.

On May 7, 1984 the petitioner paid the billing in full and filed a claim for refund, which the Department denied. The petitioner then filed a petition for review which was granted by the administrative law judge. This appeal followed.

The petitioner has a unit consisting of two employees whose assignment includes the collection of payroll information from the petitioner's various divisions, the preparation of tax returns, and arranging payment.

The petitioner's system consists of a card file arranged in alphabetical order by state name. The return for each state is clipped to that state's card together with the preaddressed envelope. Check requests are submitted through the accounting department a few days before the return is due to be mailed. One employee in the tax department and one employee in the accounting department work together to make sure that the returns and remittances go into the correct envelope.

There is no record of the petitioner ever having submitted an untimely deposit prior to this incident.

REASONS FOR DECISION

Section 13021 (all statutory references are to the Unemployment Insurance Code unless otherwise indicated) provides in part that employers shall remit the total amount of income tax withholding for the second calendar month and the first nineteen days of the third calendar month within three banking days of the nineteenth day of the third month of a calendar quarter. Notwithstanding section 1112, no penalty or interest shall be assessed against any employer who remits at least 95 percent of the amount required to be withheld, provided that the failure to remit the total amount is not willful. For purposes of

section 13021, payment is deemed complete when it is placed in a properly addressed envelope bearing correct postage and deposited in the United States mail.

Section 1112 provides as follows:

> "Any employer who without good cause fails to pay any contributions required of him or his workers . . . within the time required shall pay a penalty of 10 percent of the amount of such contributions."

Section 1113 provides:

> "Any employer who fails to pay any contributions required of him or of his workers . . . within the time required shall become liable for interest on such contributions . . . from and after the date of delinquency until paid."

Sections 1112 and 1113 are incorporated into Division 6 of the code by section 13002.

Thus it is apparent, pursuant to section 1113 which provides for no exceptions, an employer is strictly liable for interest for untimely remittances. Section 13021, as noted above, provides that payment is deemed complete when it is placed in a properly addressed envelope bearing correct postage and deposited in the United States mail. This was not done. Therefore, the return was late and the petitioner is consequently liable for interest from the time the remittance was due until June 27, 1983, when it was mailed from Virginia to California.

It remains to be determined if the petitioner had good cause, as that term is used in section 1112, for the delayed remittance. It should be noted at the outset that the standard for good cause set forth in Gibson v. Unemployment Insurance Appeals Board (1973), 9 Cal.3d 494, 108 Cal.Rptr 1, does not apply in a tax case. The proper standard is contained in Appeals Board Decision No. P-T-23 where the Appeals Board stated:

> "[Good cause] imports something more than mere excuse. It must be a substantial reason that affords a legal excuse accompanied by that degree of diligence which men of ordinary prudence would have used under similar circumstances."

Good cause clearly will lie where the circumstances causing the delay are clearly beyond the control of the employer, or where the delay is due to mistake or

inadvertence under circumstances not reasonably foreseeable by the employer. Put another way, good cause exists where the delay is not attributable to the employer's fault. Thus, catastrophic occurrences such as fire or earthquake or delays attributable to the postal service would clearly give the employer good cause. At issue is whether "good cause" can be found beyond these extremes to encompass situations where the employer has taken all the necessary precautions to insure timely filing of its tax returns but an isolated and unforeseen breakdown causes a delay.

Under the more liberal interpretation, the petitioner did have good cause for the delayed remittance. The petitioner established a system in its corporate headquarters for filing returns and remittances for each of the fifty states. It had not filed a late return at any time in California, and insofar as the record shows, for any other state or the federal government. Thus, it had reason to believe that its system insured that returns would be filed on time. This belief was not based on mere speculation but grounded in its prior experience. The delay in this case was an isolated instance of inadvertence not reasonably foreseeable by the petitioner; that is, it is not attributable to any fault of the petitioner. It thus constitutes a substantial reason which affords a legal excuse. Accordingly, we hold that the petitioner has established good cause for the delay and that it is not subject to the 10 percent penalty provided by section 1112.

In order to give direction to the Department and our administrative law judges we will discuss the application of the more liberal standard that we are adopting.

The question will arise in what instances a delayed remittance should be reasonably foreseeable, in which case an employer would be subject to the penalty. Clearly, if an employer is on notice that its procedures are inadequate and it does not meet the time limits for filing, it will be at fault and will not have good cause for the delay. A nonprecedent decision of the Appeals Board, Case No. T-83-159, which was cited by the Department in its arguments, provides a good illustration of this point. That case involved a claim for refund in the amount of $85,556.27, representing penalty on a return which was filed five days late. In that case, the Appeals Board found that the untimeliness of the employer's remittance was attributable to the petitioner's delegation to lower level employees, without adequate supervision, the responsibility to mail important tax returns. The Department had previously waived over $100,000 in penalties for late payments. Although the prior untimely remittances were attributable to other departments within the petitioner, the Board found that the petitioner was at fault in not providing adequate accountability within its

organization to insure that remittances were submitted in a timely manner.

The rule we are now adopting is in accord with the interpretation of the penalty statutes under the Internal Revenue Code (see 26 USC 6651, et seq.) by the federal courts.

These cases generally hold that inadvertence does not constitute good cause for late filing (Logan Lumber Company v. Commissioner, C.A. 5 Cir. 1966, 365 F.2d 846). In West Virginia Steel Corporation v. Commissioner, 34 T.C. 88, the president of the corporation was absent at a convention when the tax return was placed on his desk for signature. No good cause was found for the delay. The duty to file a return is the taxpayer's and the responsibility for filing cannot be delegated to an attorney or accountant. (Laney v. Commissioner, C.A. 5 Cir. 1982, 674 Fed.2d 342). Even where the taxpayer was inexperienced in business matters and entrusted the task to file a return to her attorney, there was no justification for failure to file on time (U.S. v. Kroll, C.A. 7 Cir. 1977, 547 Fed.2d 393). The press of urgent business affairs has been held not to constitute good cause for delayed filing (Consolidated Hammer Dry Plate and Film Company v. Commissioner, C.A. 7 Cir., 317 Fed.2d 829). Lack of funds to pay the amount owing on a return does not constitute good cause (Bouche v. Commissioner, 18 T.C. 1100, reversed on other grounds, 259 Fed.2d 300).

In Haywood Lumber and Mining Company v. Commissioner (C.A. 2 Cir. 1950), 178 Fed.2d 769, the Court held that a taxpayer must exercise ordinary business care and prudence in insuring that its tax returns are filed in a timely fashion. In that case the taxpayer relied upon "expert" advice that no return was due. The Court held that to constitute reasonable cause, there must be reliance on a qualified tax expert to whom all relevant facts were disclosed. The taxpayer has the burden of demonstrating the expert's qualifications and his or her reliance on such qualifications and advice. In all of these matters, the burden of proof has been on the taxpayer (Heman v. Commissioner, 32 T.C. 479, affirmed 283 Fed.2d 227).

The petitioner argues that good cause exceptions that apply to a penalty should apply equally to interest and to employer and worker contributions as well as personal income tax withholdings. The difficulty with this contention is, of course, that the law provides for different treatment for different types of taxes and distinguishes between penalty and interest. The Legislature has provided that a penalty may be waived if there is good cause for the delay, but there is no similar provision concerning interest. As an agency of limited

power the Appeals Board cannot create a good cause exception for charging interest where the Legislature has failed to.

DECISION

The decision of the administrative law judge is affirmed in part on modified rationale and reversed in part. The petition for refund is granted with respect to the penalty; that portion of the petition relating to the interest charges is denied.

Sacramento, California, July 29, 1986.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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